

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KYLE M.,

Claimant,

vs.

FAR NORTHERN REGIONAL CENTER,

Service Agency.

OAH No. 2011050204

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Chico, California, on June 16, 2011.

The Service Agency, Far Northern Regional Center (FNRC), was represented by Phyllis J. Raudman, Attorney at Law.

Advocate Lorie Atamian, Office of Clients' Rights Advocacy, represented claimant.

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUES

Is claimant entitled to an additional 120 hours of in-home respite services for the fourth quarter (April through June) of the 2010-2011 fiscal year?

FACTUAL FINDINGS

1. Claimant is a twenty-year-old conserved young man eligible for FNRC services based on a diagnosis of Cerebral Palsy and moderate mental retardation. He lives with his cousin, who is also his conservator, and her family. Claimant requires support for mobility and is considered to be wheelchair dependent. He is able to remove himself from the wheelchair to

crawl and in his home, “he walks around the house more than he crawls.” To do this, he “maneuvers himself along the walls and furniture.” Claimant uses a manual wheelchair with assistance, and a walker.

Claimant has several additional medical and behavioral needs that require supervision and care. He requires assistance with toileting, hygiene, dressing, and medication management. He does not have sufficient safety awareness to be left unsupervised. Claimant can be disruptive in social situations and has occasional emotional outbursts.

2. As indicated in his current Individual Program Plan (IPP), dated April 13, 2011, claimant’s long range goals are:

To maintain best possible overall health;

To increase communication skills in order to improve independence and social skills;

To improve mobility skills in order to improve independence and physical health/strength.

3. Pursuant to these goals, Claimant’s IPP provides for services and supports which include educational services, daycare services, In Home Supportive Services (IHSS) and respite services.

Claimant attends PV High School’s post-education program for people with disabilities.

FNRC funds up to forty hours per week of daycare services to be provided for claimant while his cousin/conservator is employed.

Butte County Department of Social Services currently funds 273 hours of IHSS per month. Claimant’s cousin/conservator currently acts as his IHSS worker.

4. The IPP states that “FNRC will purchase in-home respite services from ARC for up to 51 hours per fiscal quarter, with additional hours when approved in advance of their use. The fiscal quarters are the months July through September; October through December; January through March; April through June.” . . . “There is currently an authorization on file for an additional 93 hours respite [sic] for the April-June 2011 quarter, to be provided by ARC.”

“FNRC will fund up to 21 days of out-of-home respite in a FNRC vendored, licensed care facility.”

5. In March 2011, claimant’s cousin/conservator requested out-of-home respite placement for claimant for June 25 through June 30, 2011. Five days of out-of-home respite remained available for use and claimant’s cousin/conservator had specifically retained those days to use for a planned family vacation/reunion.

6. Finding an appropriate out-of-home respite placement for claimant during that time period became problematic. His needs are unique in that he requires a licensed non-ambulatory placement due to his inability to ambulate in an emergency situation, yet he is not a “typical” non-ambulatory consumer as he is able to remove himself from his wheelchair and move independently. This requires a different level of supervision than typically required for a non-ambulatory consumer. He also has specific behavioral needs that must be met.

7. After diligent efforts by both FNRC and claimant’s cousin/conservator, it appeared that an appropriate placement could not be found for the time period in question.

8. Claimant requested an additional 120 hours of in-home respite hours for the fourth quarter (April through June) of 2010- 2011 to accommodate her planned vacation/reunion. The hours requested would exceed 90 hours for that quarter and would be in addition to the 51 hours plus the additional 93 hours already granted for that quarter.

9. Regional centers are governed by the provisions of Welfare and Institutions Code section 4500 et seq. (Lanterman Act).¹ On July 28, 2009, Assembly Bill 9 (A.B. 9, Chapter 9, Statutes 2009), amended existing sections of, and added new sections to, the Lanterman Act. Because it “addresses the fiscal emergency declared by the Governor by proclamation on July 1, 2009,” the act was declared an urgency statute and took effect immediately when enacted on July 28, 2009.

With respect to the provision of respite services, new section 4686.5 was added to provide in relevant part:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer.

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

This suspension of purchase authority is to remain in effect pending implementation of the Individual Choice Budget (ICB), with the expectation that the ICB “will result in state budget savings sufficient to offset the costs of providing” these services. For existing consumers currently receiving such services, the law took effect on August 1, 2009.

10. In response to the mandates of section 4686.5, FNRC determined that section 4686.5, subdivision (a)(2) suspended its authority to purchase in-home respite services in excess of 90 hours per quarter absent a finding of exemption pursuant to subdivision (a)(3).

11. On April 27, 2011, FNRC issued a Notice of Proposed Action (NOPA) to claimant, advising that the “Request on 4/22/11 to fund additional 120 hours of in-home respite exception in June is denied.” The NOPA advised claimant that “A respite exception presently exists for 93 additional hours for this quarter. This second request does not meet the criteria necessary for an additional respite exception over 90 hours per quarter.”

12. On April 28, 2011, claimant’s cousin/conservator filed a Fair Hearing Request stating:

All out-of-home respite beds are full during the week I am needing care. All of my in home extra hrs are already taken due to prior commitments. I’m needing 120 extra hrs for the week of June 25th thru June 30th only for this quarter. I was trying to utilize my out of home 5 days left and now cannot due to NO HOMES AVAILABLE. I have my in home worker ready and willing to provide the whole 120 hrs. I need!”

13. Cynthia Madison is the Associate Director of Case Management Services for FNRC. She testified regarding the agency’s procedures for providing respite services. With the changes to the Lanterman Act, and the subsequent cap on respite hours mandated by the addition of section 4686.5, FNRC sought to establish criteria for determining respite exceptions. After input from the Chief Counselors of the state’s twenty-one regional centers, criteria was established that looks at the claimant’s care and supervision needs, living situation, likelihood of placing residential arrangement in jeopardy and extraordinary events that may limit the ability of the family to provide care and supervision of the consumer.

Ms. Madison also testified regarding the conversion of out-of-home respite hours to in-home hours explaining that this was not an option, as the hours would exceed the mandated cap.

14. After reviewing the exemption criteria, FNRC determined that the request for additional in-home respite for the purpose of this family vacation did not meet the exception criteria. Ms. Madison testified that it was determined that the intensity of claimant’s care and supervision needs were not such that additional respite for this vacation was necessary to maintain him in the home. In addition, the circumstances did not demonstrate an inability to meet the claimant’s care and supervision needs. Claimant’s needs are also met with education services, day care and IHSS hours.

15. Claimant's cousin/conservator testified that she retained five days of out-of home respite hours to cover the need during her planned vacation. She made the request in March and she stated that both she and claimant's FNRC Service Coordinator worked diligently to obtain a placement to no avail. She explored other options and determined that no other possibilities exist.

16. Immediately prior to the hearing in this matter, FNRC received word that a bed had become available in an appropriately licensed out-of-home respite facility beginning on June 27, 2011. This information was shared with claimant, his cousin/conservator and his advocate. The parties went off the record and entered settlement negotiations.

17. The Administrative Law Judge was informed that the parties were able to reach an agreement to meet the out-of home respite need in an appropriately licensed facility. Ms. Madison testified to the terms of the agreement on the record explaining that an agreement was reached whereby the respite provider was able to accommodate claimant beginning on the desired date, June 25, 2011, with additional 1:1 staffing that FNRC was willing to provide.

When asked on the record if the parties were in agreement with this settlement, claimant's cousin/conservator became uncomfortable. Additional time was taken off record for further discussion, after which, Claimant's cousin/conservator testified that she changed her mind and chose not to accept the available placement. She explained that she was uncomfortable with the placement and would not feel right leaving claimant there. She was concerned with what she believed were inconsistencies in statements made by the respite provider as well as her perceptions from a facility visit approximately two years ago. She stated that if she couldn't find another placement for claimant that she felt was suitable, she "might have to stay home."

Claimant was present during the hearing and the close relationship he shares with his cousin/conservator was very evident.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional centers' responsibility for providing services to persons with development disabilities. An "array of services and supports should be established...to meet the needs and choices of each person with developmental disabilities...to support their integration into the mainstream life of the community...and to prevent dislocation of persons with developmental disabilities from their home communities." (§ 4501.) The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648.)

2. In-home respite is a service that regional centers may purchase for consumers. Section 4690.2, subdivision (a), provides as follows:

“In home respite services” means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s own home, for a regional center client who resides with a family member. These services are designed to do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision to ensure the client’s safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family members.

3. Effective July 28, 2009, section 4686.5 of the Lanterman Act provides:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

- (1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.
- (2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.
- (3) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer.

4. Section 4686.5 requires FNRC to limit the purchase of respite services for claimant to 90 hours per quarter unless the regional center determines that claimant meets the criteria for an exemption. FNRC has determined that claimant qualifies for an exemption and his IPP provides for 93 additional respite hours beyond the 51 hours authorized for the fourth quarter of the 2010-2011 fiscal year. Claimant then bears the burden of establishing that he is

entitled to additional exemption hours pursuant to section 4686.5, subdivision (a)(3).² Claimant has not met that burden. Evidence presented was not persuasive that claimant's care and supervision needs require additional respite hours beyond those granted.

An out-of-home respite placement in an appropriately licensed facility became available to meet claimant's needs for the requested dates. There was no credible evidence presented to demonstrate that the offered placement was not appropriate to meet claimant's needs.

FNRC agreed to continue searching for other appropriate out-of-home respite situations that may become available prior to the requested vacation dates.

ORDER

The appeal of claimant Kyle M. seeking funding for 120 additional respite hours for the fourth quarter 2010-2011 is denied.

DATED: June 20, 2011

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)

² California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."